

No. 1-13-0006

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 93-CR-19978
)	
JAN NEWELL,)	Honorable
)	Joseph G. Kazmierski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

- ¶ 1 *Held:* The judgment of the circuit court was affirmed where the defendant failed to establish he was entitled to relief.
- ¶ 2 The defendant, Jan Newell, appeals from the circuit court order which dismissed his petition for a writ of mandamus arguing that his sentence to 40 years' imprisonment and three years' mandatory supervised release (MSR) following a 1996 conviction of murder (Ill. Rev. Stat. 1993, ch. 38, par. 9-1(a)(1)) was void. We affirm.
- ¶ 3 Following his conviction of murder, the defendant filed a direct appeal contending the trial

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court abused its discretion when it imposed his sentence. This court affirmed the defendant's conviction and sentence. *People v. Newell*, No. 1-96-4328 (1997) (unpublished order under Supreme Court Rule 23).

¶ 4 On June 4, 1998, the defendant filed a *pro se* postconviction petition (725 ILCS 5/122 *et seq.*) (West 1998)), alleging several claims of ineffective assistance of counsel and a claim that he did not knowingly waive his right to a jury trial. The trial court dismissed the claims as frivolous and patently without merit. This court affirmed that dismissal. *People v. Newell*, No. 1-98-2920 (2000) (unpublished order under Supreme Court Rule 23).

¶ 5 On October 23, 1998, the defendant filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1998)), alleging several of the claims raised in his earlier postconviction petition and two new claims stemming from evidentiary issues. The trial court dismissed that petition on June 30, 2005, finding the claims were barred by the doctrine of *res judicata* and his two new claims lacked merit. This court affirmed that judgment. *People v. Newell*, No. 1-05-2293 (2007) (unpublished order under Supreme Court Rule 23).

¶ 6 On January 25, 2012, the defendant sought leave to file a successive postconviction petition, alleging ineffective assistance of counsel and requesting DNA testing. On April 18, 2012, the trial court denied the defendant leave to file the petition.

¶ 7 On August 15, 2012, the defendant filed a petition for a writ of mandamus, arguing that his sentence is void because the Illinois Department of Corrections (IDOC) increased his sentence by imposing a three-year MSR term without the trial court's authorization. On October 26, 2012, the trial court determined that the defendant's argument lacked merit and dismissed the petition. This

appeal followed.

¶ 8 Mandamus is an extraordinary remedy used to enforce, as a matter of right, a public officer's performance of his or her public duties where no exercise of discretion on the officer's part is involved. *People ex rel. Waller v. McKoski*, 195 Ill. 2d 393, 398, 748 N.E.2d 175 (2001). A writ of mandamus provides affirmative relief and can be used to compel the undoing of an act. *Id.* "A writ of mandamus will be granted only if a plaintiff can establish a clear, affirmative right to relief, a clear duty of the public officer to act, and clear authority in the public officer to comply with the writ." *Id.*

¶ 9 The defendant concedes that he was subject to a three-year MSR term, but argues only that the IDOC exceeded its authority by imposing the term where the trial court judge did not include the term in his sentence. This argument fails, however, as our supreme court has already recognized that MSR terms are statutorily required and the court has no power to withhold such period in imposing a defendant's sentence. *People v. Whitfield*, 217 Ill. 2d 177, 200-01, 840 N.E.2d 658 (2005); *People v. McCurry*, 2011 IL App (1st) 093411, 961 N.E.2d 900, 903 appeal denied, 968 N.E.2d 86 (Ill. 2012). In fact, "[t]he sentence to a mandatory parole is a part of the original sentence by operation of law." *People ex rel. Scott v. Israel*, 66 Ill. 2d 190, 194, 361 N.E.2d 1108 (1977). Further, our supreme court has previously held that MSR sentences fall within the powers of the Illinois General Assembly and such statutes do not violate the separation of powers clause of the Illinois Constitution of 1970. *Id.* Thus, the trial court did not err in dismissing the defendant's petition as he has failed to establish that he has an affirmative right to relief.

¶ 10 In so holding, we reject the defendant's reliance on *Early v. Murray*, 451 F.3d 71 (2nd Cir.

2006) as our supreme court has rejected application of *Early* in a similar case, finding the case had no authority in Illinois. *People v. Evans*, 2013 IL 113471, ¶ 15. Additionally, *Early* involved a negotiated plea and is factually dissimilar to the case at bar. *Early*, 451 F.3d at 72 (a recent change in New York law, unbeknownst to the trial judge and the parties, mandated an MSR period which was not contemplated in the defendant's plea).

¶ 11 The defendant's other cases are equally unpersuasive. See *Hill v. Wampler*, 298 U.S. 460, 462-63 (1936) (involving a sentence term that was not mandated by law, unlike the MSR term at issue in this case); *United States ex. rel. Carroll v. Hathaway*, 2012 WL 171322 (N.D.Ill., Jan. 19, 2012) (district court order finding IDOC's imposition of MSR term violated the defendant's due process rights was reversed upon reconsideration in *Carroll v. Hathaway*, 2012 WL 6758319 (N.D. Ill. Sept. 5, 2012)). Accordingly, the defendant has failed to establish that he has an affirmative right to relief.

¶ 12 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 13 Affirmed.